Supreme Court, U.S.
FILED

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No.

In The
Supreme Court of the United States

RICHARD A. RADWANSKI, *et al.*,
Petitioners,

v.

SAMUEL J. RUIZ AND CARMEN LYDIA FRET APONTE,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Question Presented for Review

A. Are omissions in an Affidavit of Probable Cause, which if included would not defeat a finding of probable cause, sufficient grounds to preclude "Qualified Immunity" as a defense to Richard A. Radwanski against claims that he was a violation of Fourth Amendment rights?

List of All Parties to the Proceedings

Petitioner is Richard A. Radwanski, defendant-appellant below.

Respondents are Samuel J. Ruiz and Carmen Lydia Fret Aponte, plaintiffs-appellees below.

In a companion case consolidated for trial:

Martin Barrett	Defendant/Appellant
Todd Breiner	Defendant/Appellant

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PETITION FOR A WRIT OF CERTIORARI

Richard A. Radwanski ("petitioner") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion below is reported at *Samuel Ruiz, et al. v. Lebanon County, et al.*, 2009 WL 826841 (3rd Cir Ct. of App.) (no official cite). The lower court memorandum and opinions and orders have no citation and are contained in the appendix.

JURISDICTION

Judgment of the Third Circuit was entered on March 31, 2009. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

U. S. Constitution 4th Amendment; 28 U.S.C. Section1331 and 28 U.S.C. Section 1343 as they related to 42 U.S.C. Section 1983.

Concise Statement of the Case Setting Out the Facts Material to Consideration of the Questions Presented

This is a matter that raises issues regarding the rights of a police officer to the defense of qualified immunity versus the rights of a suspect in the illegal distribution of drugs based upon the presentation of an Affidavit of Probable Cause in order to obtain an arrest warrant. This matter should be reviewed by this Court because the United States Court of Appeals has decided an important federal question in a way that conflicts with a decision by a state court of last resort and has affirmed and sanctioned the District Court's departure from the accepted and usual course of judicial proceedings.

It would appear that the District Court has departed from the existing law established by the Supreme Court of Pennsylvania for the establishment of probable cause to arrest and the contents of an Affidavit of Probable Cause. See District Court Opinions dated February 15, 2008 and October 3, 2007 contained in Appendix. See also three Affidavits of Probable Cause contained in Appendix. Probable cause to arrest exists if the facts and circumstances within the officer's knowledge have been gained as a result of reasonably

trustworthy means and are sufficient to warrant a man of reasonable caution to believe that the suspect has committed or is committing a crime. ***Commonwealth v. Murray***, 437 Pa. 326, 263 A.2d 886 (1970); ***Commonwealth v. Marino***, 435 Pa. 245, 255 A.2d 911 (1969). Upon review of the District Court's Opinion, the District Court, in its "after-the-fact scrutiny" of the Affidavits of Probable Cause found only omissions of fact that the District Court believed should have been included. However, there is no indication that if the omissions of fact had been included that a finding of probable cause would not have occurred. In this matter, clearly on the face of the Affidavits there is sufficient information to believe that a crime was committed by a person named Samuel Ruiz. The materiality of the omissions in a probable cause determination has been addressed by the Third Circuit Court of Appeals in ***United States v. Frost***, 999 F.2d 737, 743 (3rd Cir. 1993). The Third Circuit Court of Appeals held that where an omission, rather than a misrepresentation, is the basis for a challenge to an affidavit for an arrest warrant, a court should inquire whether the affidavit would have provided probable cause if it had contained a disclosure of the omitted information. The courts of the Commonwealth of Pennsylvania have followed this test in reviewing probable cause issues. See e.g., ***Commonwealth v. Baker***, 532 Pa. 121, 615 A.2d 23, 26-27 (1992); ***Commonwealth v. Ceriani***, 411

Pa. Super. 96, 600 A.2d 1282, 1285 (1991); and ***Commonwealth v. Yerger***, 333 Pa. Super 501, 482 A.2d 984, 990-991 (1988). The Court of Appeals, in affirming the District Court decision, departs from and is contrary to the test established by that Court. Clearly, in the instant case, if the missing information would have been included, it would have enhanced the probable cause and the arrest warrant would have been issued. There is no evidence in this record that the affiants deliberately withheld information so as to deceive the magistrate judge in order to obtain the arrest warrant where probable cause did not exist.

Further, it is believed that an injustice has been created by the District Court in its "after-the-fact scrutiny" of an Affidavit of Probable Cause that took the "form of a *de novo* review". This Court, in ***Illinois v. Gates***, 462 U.S. 213, 235, 103 S.Ct. 2317 (1983), has indicated that upon reviewing the sufficiency of an affidavit and resulting warrant, the District Court is not to engage in such activity. As a result of the District Court's "after-the-fact scrutiny" of the Affidavit of Probable Cause in this case, an injustice has occurred. The Court of Appeals has sanctioned the departure of the District Court from the accepted and usual course of judicial proceedings as established by this Honorable Court.

In addition to disregarding the standard of review established by the Supreme Court, the District Court also disregarded the test established

by the Supreme Court in ***Franks v. Delaware***, 438 U.S. 154 (1978). The test requires a showing that the maker of the affidavit either stated a deliberate falsehood or acted with a reckless disregard for the truth. In ***Franks***, the Supreme Court stated:

> There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient.

In its analysis, the District Court disregards this test and merely looks for omissions in the Affidavit of Probable Cause to second guess the Magistrate Judge, who was reviewing the matter and issuing the Arrest Warrant. There is no indication in the record that there was a deliberate falsehood or that the officers making the affidavit acted with reckless disregard for the truth. The District Court seems to

establish a different standard of review that is not sanctioned by the Supreme Court.

As a result of the above, a police officer has been deprived of qualified immunity as an absolute defense to the claims in this case. The doctrine of qualified immunity protects police officers performing discretionary functions, such as arrests. See ***Wilson v. Layne***, 526 U.S. 603, 119 S.Ct. 1692, 1696, 143 L.Ed. 2d 818 (1999). In Section 1983 cases involving alleged false arrest, the inquiry is whether a reasonable officer could have believed that his or her conduct was lawful, in light of the clearly established law and the information in the officer's possession. ***Sharrar v. Felsing***, 128 F.3d 810, 827 (3rd Cir. 1997)(citing ***Hunter v. Bryant***, 502 U.S. 224, 227, 112 S.Ct. 534, 116 L.Ed. 2d 589 (1991)). Police officers "who reasonably but mistakenly conclude that their conduct comports with the requirements of the Fourth Amendment are entitled to immunity." ***Sharrar v. Felsing***, 128 F.3d at 826 (quoting ***Hunter v. Bryant***, 502 U.S. at 227, 112 S.Ct. 534). "In this way, the qualified immunity standard gives ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law." ***Sharrar v. Felsing***, 128 F.3d at 826 (quoting ***Hunter v. Bryant***, 502 U.S. at 229, 112 S.Ct. 534). There has been absolutely no evidence presented in this case that Petitioner, Richard A. Radwanski, knowingly violated the law or that any of his actions constituted anything more than a possible mistake in judgment.

The crux of Respondents' claim as it relates to the issue of application of qualified immunity is whether the arrest was made with or without probable cause. A law enforcement officer "can have reasonable, but mistaken, beliefs as to the facts establishing the existence of probable cause ... and in [that] situation courts will not hold that they have violated the Constitution." ***Saucier v. Katz***, 533 U.S. 194, 206 (2004). In this case, there is no evidence that Richard A. Radwanski did not have reasonable beliefs as to the facts establishing the existence of probable cause. All the evidence produced in this matter supports and establishes that the law enforcement officers had the reasonable belief that the information they had, both first hand and through a reliable informer, established the existence of probable cause.

Respectfully submitted,

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Date: June 18, 2009

APPENDIX

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 07-4244

SAMUEL RUIZ; CARMEN LYDIA FRET APONTE

v.

LEBANON COUNTY, PENNSYLVANIA, A county organized and existing within the state of Pennsylvania; LEBANON CITY, PENNSYLVANIA, A municipal Corporation; THE LEBANON CITY POLICE DEPARTMENT, A police department organized and existing in Lebanon City Pennsylvania; LEBANON COUNTY, PENNSYLVANIA DRUG TASK FORCE, A joint drug task force organized and existing in Lebanon County, Pennsylvania; LEBANON COUNTY PRISON, A prison detention center organized and existing in the county of Lebanon, Pennsylvania; TIMOTHY KNIGHT; TODD BREINER; RICHARD A. RADWANSKI; BRETT HOPKINS; UNKNOWN FEMALE POLICE OFFICER; MARTIN BARRETT

Todd Breiner; Martin Barrett,
Appellants

No. 08-1672

SAMUEL RUIZ; CARMENT LYDIA FRET APONTE

v.

LEBANON COUNTY, PENNSYLVANIA, A county organized and existing within the state of Pennsylvania; LEBANON CITY, PENNSYLVANIA, a Municipal Corporation; LEBANON CITY POLICE DEPARTMENT, a police department organized and existing in Lebanon City, Pennsylvania; LEBANON COUNTY, PENNSYLVANIA DRUG TASK FORCE, A joint drug task force organized and existing in Lebanon County, Pennsylvania; LEBANON COUNTY PRISON, a prison detention center organized and existing in the county of Lebanon, Pennsylvania; TIMOTHY KNIGHT; TODD BREINER; RICHARD A. RADWANSKI; BRETT HOPKINS; UNKNOWN FEMALE POLICE OFFICER; MARTIN BARRETT

Richard Radwanski
Appellant

On Appeal From the United States District Court
For the Middle District of Pennsylvania
(D.C. No: 04-cv-02359)
District Judge: Honorable Sylvia H. Rambo

Argued March 3, 2009

Before: SCIRICA, Chief Judge, SLOVITER, and HARDIMAN, Circuit Judges

(Filed: March 31, 2009)

James W. Gicking (Argued)
Marshall, Dennehey, Warner, Coleman & Goggin
Philadelphia, PA 19103

Attorney for Appellants Breiner and Barrett, No. 07-4244

Charles E. Wasilefski (Argued)
Peters & Wasilefski
Harrisburg, PA 17110

Attorney for Appellant Radwanski, No. 08-1672

Clarence E. Allen (Argued)
York, PA 17401

Attorney for Appellees

OPINION

SLOVITER, Circuit Judge.

I.

Background

Three Lebanon County police officers appeal the District Court's orders denying their motions for summary judgment on the issue of qualified immunity. We have jurisdiction over this interlocutory appeal. *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985).

A. The Drug Sales and Arrest

As we write primarily for the benefit of the parties, we include only those facts that are necessary for our disposition of the case. While Detective Martin Barrett was driving in Lebanon County, Pennsylvania, on June 12, 2002, on surveillance of controlled drug purchases, he observed a confidential informant ("CI") make a drug purchase from a man the CI later identified as Peto. Detective Barrett saw only the back side of the

dealer, not the face. Less than a week later, on June 18, 2002, Detective Todd Breiner observed the same informant purchase drugs from the same individual, and on July 10 another informant made another drug purchase, identifying the seller as Peto. Breiner did not see the drug dealer. After these buys, Breiner conducted an investigation and learned that "Peto was a nickname for a Samuel Ruiz who lived at 197 Lebanon Village, Lebanon, Pennsylvania." Radwanski App. at 17a-18a.

On the basis of this information and the drug buys, the police officers collectively prepared three criminal complaints, one for each transaction, and the officers prepared three affidavits. Each affidavit began, "[y]our affiants are" and listed three members of the Lebanon County Detective Bureau/Lebanon County Drug Task Force, each of whom then signed the corresponding affidavit. Barrett & Breiner App. at 106a, 109a, 112a. The first affidavit was signed by Breiner and Detective Richard Radwanski, the second by Breiner, and the third by Radwanski and Barrett. Because the three affidavits are similar, we will set forth the language of only the one analyzed by the District Court, which was sworn October 11, 2002, and reads:

> Your affiants are Sergeant Brett Hopkins, Detective Todd Breiner, and Detective Sergeant Richard A. Radwanski, all members of the Lebanon County Detective Bureau/Lebanon County Drug Task Force, Lebanon County, Pa. That your affiants have

extensive training and experience in the investigation of drug law violations and have been trained in the administration of drug field testing.

On 10 Jul 02, at about 2044hrs, while in the 800 block of E. Crowell Street, Lebanon City, Lebanon County, Pa, the defendant, Samuel Ruiz, sold/delivered Cocaine, a schedule II controlled substance, and Heroin, a schedule I controlled substance, to Lebanon County Drug Task Force/Drug Enforcement Administration confidential informant #15-2001, in exchange for the sum of $40.00.

Your affiants conducted chemical field tests on the suspected Cocaine and Heroin. These tests were positive, respectively, for Cocaine, a schedule II controlled substance, and Heroin, a schedule I controlled substance.

That Samuel Ruiz arranged this Cocaine and Heroin delivery via the use of a residential and/or cellular telephone.

Your affiants request a warrant of arrest be issued for the named defendant.

Barrett & Breiner App. at 106a.

The three affidavits were presented to a Pennsylvania state district justice, who issued a

warrant for the arrest of Samuel Ruiz. The warrant listed Ruiz's address as 197 Lebanon Village, Lebanon, Pennsylvania. However, when the police went to 197 Lebanon Village, they were told that Ruiz had moved to 63 North 12th Street. When the police arrived at the house at 63 North 12th Street, Ruiz was downstairs getting a bottle for his son and the police threw him to the floor and handcuffed him.[1] He was taken to the police station, where he was eventually released when it was discovered he was not the suspect in the drug sale. In response, Ruiz and his wife filed this action pursuant to 42 U.S.C. §1983, naming, inter alia, Radwanski, Breiner, and Barrett as defendants.

B. The Proceedings in the District Court

The defendants filed motions for summary judgment based on a defense of qualified immunity,[2]

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[1] Shortly thereafter, some of the officers went upstairs, and one of them searched Ruiz's wife in an intensive and highly personal manner. At oral argument we were advised that the officers involved in that search could not be identified. This issue is not before the court.

[2] Breiner and Barrett filed a joint motion. After the District Court denied their motions, Radwanski filed his motion, which the District Court denied based on the analysis it had used for the Breiner and Barrett motion.

asserting that they had conducted a reasonable investigation. The District Court noted that the plaintiffs had responded to this motion by arguing that the police had instead "conduct[ed] a negligent investigation and recklessly provid[ed] incorrect information in their affidavits of probable cause." Radwanski App. at 26a n.9. The District Court declined to consider those arguments on summary judgment because the complaint did not allege negligent investigation or reckless provision of information.

Instead, the Ruiz complaint alleged a lack of probable cause for the arrest (and correspondingly the arrest warrant). In ruling on the summary judgment motions, the court thus analyzed the affidavits sworn by the officers to determine whether they supplied a basis for probable cause. Because the analysis provided a thorough textbook primer of the applicable legal principle, we quote liberally from the District Court's opinion.

At the outset, the District Court noted that "[a]n affidavit of probable cause must state facts showing [a] 'fair probability' that the proposed target of arrest engaged in criminal activity." Radwanski App. at 27a (quoting *Wilson v. Russo*, 212 F.3d 781, 789 (3d Cir. 2000). The Court continued, "[t]he contents of the affidavit should enable the magistrate to make a practical, common-sense decision whether, considering the totality of the circumstances, probable cause exists to arrest the person accused." Radwanski App. at 27a (citing *Illinois v. Gates*, 462 U.S. 213, 232, 238 (1983)).

In light of the officers' reliance on confidential informants, the District Court stated that when

"police rely on a confidential informant to provide some of the information in an affidavit, the magistrate must be informed of 1) some of the underlying circumstances supporting the informant's story and 2) some of the underlying circumstances leading to the affiant's conclusion that the informant may be believed." Radwanski App. at 28a (citing *Gates*, 462 U.S. at 231). Such information should include both "first-hand account[s] of illegal activity, supported by sufficient detail" and "the facts of [the officer's] own investigation that corroborate the illegal activity alleged by [the] informant." Radwanski App. at 29a (citing *Gates*, 462 U.S. at 226, 234 and *United States v. Ritter*, 416 F.3d 256, 263 (3d Cir. 2005).

Turning to the affidavits underlying the warrants in this case, the District Court found that there was an insufficient basis to establish probable cause to issue the arrest warrant. The court noted that the affidavits "set forth conclusory statements that Samuel Ruiz committed the crimes cited therein." Radwanski App. at 33a. While the affidavits claimed they were "true and correct to the best of [each affiant's] knowledge or information and belief[,]. . . none of the affidavits establish[ed] the *factual basis* for the affiants' knowledge or information and belief." Radwanski App. at 33a (emphasis and first alteration in original). In analyzing the affidavit quoted above, the District Court stated:

> The second and fourth paragraphs . . . are the sources of this affidavit's constitutional infirmity. They state the affiants' conclusion

> that Samuel Ruiz sold drugs on the date and time identified, arranging the transaction by telephone. There are no facts or circumstances that would allow the [district justice][3] to draw the inference, as required by the Fourth Amendment – such as how the affiants came to know that the seller's name was Samuel Ruiz.

Radwanski App. at 34a. The District Court continued:

> Moreover, the affidavit states that a confidential informant purchased the drugs from Samuel Ruiz. It appears from the face of the affidavit that the informant's only involvement in this case was just that – the purchase. The affidavit fails to relate that the police relied on one or both informant's informal identification of the seller by the nickname "Peto" to begin their investigation of the seller's testimony.

Radwanski App. at 35a.

The District Court then held it was error for the officers to "fai[l] to relate th[e] operative fact" that part of the information had come from a confidential informant. Radwanski App. at 35a. Along with this, the officers had "also failed to set

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[3] The District Court set out the law in terms of the magistrate as the impartial decisionmaker, although, in this case, the warrants were presented to, and signed by, a state district justice. There is no legal distinction for this purpose.

forth any factual support for the informant's credibility, reliability, veracity, or basis of knowledge. They did not provide facts that would corroborate or confirm the informal identification of the seller as 'Samuel Ruiz.'" Radwanski App. at 35a. Having concluded that the defendants' affidavits "failed, as a matter of Fourth Amendment jurisprudence, to provide a substantial basis for the [district justice] to find probable cause to arrest," the District Court proceeded to consider whether the requirements for an affidavit of probable cause were clearly established at the time the affidavits were sworn. Radwanski App. at 36a.

The Court spent little time on that issue because the right to be free of arrest without probable cause was clearly established at the time defendants submitted their affidavits. The Court noted that that right was established not only in the Fourth Amendment, but also in cases decided by the Supreme Court of the United States, citing, inter alia, *Gates*, 462 U.S. at 239, and this court's decision in *Orsatti v. N.J. State Police*, 71 F3d 480, 482 (3rd Cir. 1995).

Finally, the District Court looked at whether the officers had made an objectively reasonable mistake, given the facts known to the officers when they swore to the affidavits and viewing those facts in the light most favorable to the plaintiffs, as required at this stage. The District Court noted that this was not a case where the officers were "faced with making a split-second decision in the 'dangerous and complete world' of law enforcement." Radwanski App. at 37a (quoting *Carswell v. Borough of Homestead*, 381 F.3d 235, 244 (3rd Cir. 2004)).

Indeed, the affidavits were not drafted until four months after the events. The District Court thus concluded that "it [was] well below the standards of professionalism expected of police officers to issue such conclusory affidavits as the three at bar," which had "no facts. . .that allowed the issuing [district justice] to make an independent link between the transaction for illegal drugs and someone named Samuel Ruiz." Radwanski App. at 39a.

At oral argument, this court asked counsel for the officers whether they disagreed with any statement of law or fact in the District Court's opinion. In response, counsel was unable to point to any error.

It follows that we are unable to hold that the District Court erred as a matter of law in denying qualified immunity to the officers at this stage of the proceedings. Nothing that we hold will preclude, however, the factfinder from deciding that the officers' actions were objectively reasonable based on facts shown at a later point in this matter. We will therefore affirm the District Court's orders denying the officers' motions for summary judgment.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
PENNSYLVANIA

SAMUEL RUIZ and CARMEN LYDIA FRET APONTE, Plaintiffs	:	CIVIL NO: 1:04-CV-02359
	:	JUDGE
	:	SYLVIA H. RAMBO
v.	:	
LEBANON COUNTY, PENNSYLVANIA, et al., Defendants	:	

ORDER

In accordance with the foregoing memorandum of law, **IT IS HEREBY ORDERED THAT:**

1) The motion for summary judgment by Defendant City of Lebanon (Doc. 112) is **GRANTED.**

2) The motion for summary judgment by Defendants Lebanon County, Lebanon County Drug Task Force, Lebanon County Prison, and Richard A. Radwanski (Doc. 110) is **GRANTED IN PART AND DENIED IN PART.** The motion is **GRANTED** as to Defendants Lebanon County, Lebanon County Drug Task Force, and Lebanon County Prison. The motion is **DENIED** as to Defendant Richard A.

Radwanski (Doc. 110) because he is not entitled to qualified immunity.

3) Defendants Martin Barrett and Todd Breiner, having been denied qualified immunity, have appealed. The court declines to sever the claims against Defendant Radwanski from the claims against Defendants Barrett and Breiner at this time. Thus, all case management deadlines are stayed pending the outcome of any and all appeals on the issue of qualified immunity.

/s/ Sylvia H. Rambo
SYLIVA H. RAMBO
United States District Judge

Dated: February 15, 2008.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
PENNSYLVANIA

SAMUEL RUIZ and CARMEN LYDIA FRET APONTE, Plaintiffs	:	CIVIL NO: 1:04-CV-02359
	:	JUDGE
	:	SYLVIA H. RAMBO
IV.	:	
LEBANON COUNTY, PENNSYLVANIA, et al., Defendants	:	

MEMORANDUM

IV. Background

Plaintiffs Samuel Ruiz and Carmen Lydia Fret Aponte sued numerous Defendants because of a mistaken arrest that occurred in October 2002. The Defendants that remain party to this action are Lebanon County ("County"), Lebanon City ("City"), the Lebanon County Drug Task Force ("Task Force"), the Lebanon County Prison ("Prison"),[1] Richard A. Radwanski, Todd Breiner, and Martin Barrett. The operative facts surrounding the arrest are set forth in the memorandum issued by this court on October

[1] Collectively, "Municipal Defendants."

3, 2007. (Doc. 89.) The court presumes familiarity with that memorandum.

On October 3, 2007, this court denied Breiner and Barrett's motion for summary judgment based on qualified immunity. They have appealed that order. On October 19, 2007, counsel for the parties met with the court for a pretrial conference. At the conference, it became clear that this case was prepared to move swiftly to trial. Accordingly, the court allowed counsel to brief additional matters appropriate for judgment by the court. To that end, Municipal Defendants and Radwanski filed motions for summary judgment on November 15, 2007. (Docs. 110-114.) Plaintiffs filed their opposition to the motions on November 30, 2007. (Docs. 117-18.) The issues are ripe for disposition.

IV. Legal Standard - Summary Judgment

Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *accord Saldana v. Kmart Corp.*, 260 F.3d 228, 231-32 (3d Cir. 2001). A factual dispute is "material" if it might affect the outcome of the suit under the applicable law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A factual dispute is "genuine" only if there is a sufficient evidentiary basis that would allow a reasonable fact-finder to return a verdict for the non-moving party. *Id.* at 248. The court must resolve all doubts as to the existence of a

genuine issue of material fact in favor of the non-moving party. *Saldana*, 260 F.3d at 232; *see also Reeder v. Sybron Transition Corp.*, 142 F.R.D. 607, 609 (M.D. Pa. 1992).

Once the moving party has shown that there is an absence of evidence to support the claims of the non-moving party, the non-moving party may not simply sit back and rest on the allegations in its complaint. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). Instead, it must "go beyond the pleadings and by [its] own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." *Id.* (internal quotations omitted); *see also Saldana*, 260 F.3d at 232 (citations omitted). Summary judgment should be granted where a party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden at trial." *Celotex*, 477 U.S. at 322-23. "'Such affirmative evidence – regardless of whether it is direct or circumstantial – must amount to more than a scintilla, but may amount to less (in the evaluation of the court) than a preponderance.'" *Saldana*, 260 F.3d at 232 (quoting *Williams v. Borough of West Chester*, 891 F.2d 458, 460-61 (3d Cir. 1989)).

IV. Discussion

The Municipal Defendants argue that summary judgment is proper because Plaintiffs have failed to show that municipal liability may properly be imposed under *Monell v. Department of Social*

Services, 436 U.S. 658, 694 (1978).[2] Radwanski submits that he is entitled to qualified immunity. These arguments will be addressed in turn.

1. **Municipal Defendants**

All claims in this case are brought under 42 U.S.C. § 1983, which provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

A plaintiff must demonstrate that each defendant "individually participated in the alleged constitutional violation or approved of it." *C.N. v. Ridgewood Bd. Of Educ.*, 430 F.3d 159, 173 (3d Cir. 2005) The corollary in municipal liability is that the plaintiff must demonstrate that the municipality itself caused a constitutional violation. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978).

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[2] The Prison argues that it may not be held liable under §1983 because it is not a "person" to whom the statute applies. Because the court disposes of its motion for summary judgment on an alternative ground, this argument need not be addressed.

Respondeat superior is not a viable theory of municipal liability under § 1983; rather, a plaintiff must plead and prove that "through its *deliberate* conduct, the municipality was the 'moving force' behind the injury." *Bd. Of County Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 405 (1997); *accord Jett v. Dallas Indep. Sch. Bd.*, 491 U.S. 701, 737 (1989). To do so, a plaintiff must show that a municipal custom or policy was the proximate cause of the constitutional injury sustained. *C.N.*, 430 F.3d at 173; *Andrews v. City of Phila.*, 895 F.2d 1469, 1480 (3rd Cir. 1990).

Plaintiffs submit that they have successfully alleged that the individual defendants in this matter acted according to a municipal custom, practice or policy. On this point they are correct, but the time for resting on allegations is past. Plaintiffs submit that Breiner was "part of a civil suit brought against Lebanon City resulting from [a] shooting of a suspect. The case was settled. The . . . civil suit brought against Defendant Lebanon City established a practice custom and policy of Lebanon City." (Doc. 117 ¶¶ 13-14 (citations omitted).) Moreover, according to Plaintiffs, "[w]hen [the County and the City] entered into an agreement with [the City] to form [the Task Force], which was/is a joint venture, they assumed liability for the past custom, policies and practice of [the City], including the past practice, policy and custom established by the 1998 civil suit." (*Id* ¶ 15). These allegations of "fact" are woefully inadequate to withstand summary judgment on a *Monell* claim. The Municipal Defendants will be granted summary judgment on all claims.

2. Radwanski

Once again, the court refers the parties to its memorandum and order of October 3, 2007, in which it denied qualified immunity to Defendants Barrett and Breiner. The analysis therein applies equally to Radwanski without the necessity of further discussion. His arguments on summary judgment are unavailing. Radwanski will be denied qualified immunity and, therefore, denied summary judgment.

IV. Conclusion

The Municipal Defendants' motion for summary judgment will be granted, but Radwanski's motion for summary judgment will be denied. An appropriate order will follow.

/s/ Sylvia H. Rambo
SYLVIA H. RAMBO
United States District Judge

Dated: February 15, 2008

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
PENNSYLVANIA

SAMUEL RUIZ and CARMEN LYDIA FRET APONTE, Plaintiffs	:	CIVIL NO: 1:04-CV-02359
	:	JUDGE
	:	SYLVIA H. RAMBO
v.	:	
LEBANON COUNTY, PENNSYLVANIA, et al., Defendants	:	

MEMORANDUM

This lawsuit arises from a case of mistaken arrest. On October 28, 2002, police officers arrived at 63 North 12t Street, Lebanon City, Pennsylvania and arrested Plaintiff Samuel J. Ruiz. They carried a warrant for the arrest of "Samuel Ruiz," alleged to be residing at 197 Lebanon Village, Lebanon, Pennsylvania. The Samuel Ruiz arrested on October 28, 2002, was not the same Samuel Ruiz actually sought by the police. Plaintiff Samuel Ruiz now sues for the mistaken arrest and, with his wife Plaintiff Carmen Lydia Fret Aponte,[1] for the subsequent

[1] Plaintiff Carmen Lydia Fret Aponte goes by "Ms. Fret." (Fret Dep. 4:16-19, Sept. 6, 2006.)

search of their home and the search of Plaintiff Fret's person.

Defendants,[2] Detective Martin Barrett and Detective Todd Breiner of the Lebanon County Police Department, swore affidavits of probable cause and criminal complaints that led to the arrest warrant of Samuel Ruiz of 197 Lebanon Village. They seek summary judgment on the basis of qualified immunity. For the reasons that follow, the court will deny their motion.

I. Background

A. Facts

The following facts are undisputed, except where noted. The subset of facts before the court involves three purchases of illegal drugs and the three corresponding affidavits of probable cause sworn by Defendants Barrett and Breiner. The affidavits led to the issuance of the arrest warrant executed upon Plaintiff Ruiz.

1. The Drug Buys

On June 12, 2002, Defendant Barrett conducted surveillance of a controlled purchase of illegal drugs. (Doc. 69-1 at 5; Doc. 65 ¶ 6).

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[2] Defendants Martin Barrett and Todd Breiner have moved for summary judgment. The other Defendants in this matter are Lebanon County, Pa., Drug Task Force, Lebanon County Prison, Timothy Knight, Richard A. Radwanski, Brett Hopkins, and an Unknown Female Police Officer. (Doc. 29) "Defendants" shall be used to identify only Defendants Barrett and Breiner.

Confidential police informant No. 19-2001 purchased the drugs from a dealer known to the informant as "Peto." (Doc. 69-1 at 5; Doc. 69-2 ¶ 4; Breiner Dep. 39: 23-25, Nov. 29, 2006.) Defendant Barrett observed the transaction as he drove past the participants. (Barrett Dep. 9:18-21, Nov. 29, 2006.) He saw the seller from the back and the side, but never saw his face. (*Id.* 9:18-23; Doc. 69-2 ¶ 12.) Defendant Barrett's only description of the seller was a Hispanic male with short, dark hair and a thin build, standing about 5'7" to 5'9" tall. (Barrett Dep. 14:10-15; Doc. 69-2 ¶ 11.)

On June 18, 2002, and July 10, 2002, Defendant Breiner conducted surveillance of controlled purchases of illegal drugs by informant No. 19-2001 and No. 15-2001, respectively, from a man that one or both of the informants called "Peto."[3] (Doc. 65 ¶ 8; Doc. 69-2 ¶ 4.) Defendant Breiner never personally saw Peto, but one or both of the informants described him as a thin Hispanic male with dark hair, standing about 5'6" to 5'8" tall. (Breiner Dep. 16:21-17:9.) The confidential informants were the only individuals to have seen the face of the drug dealer. (Doc. 69-2 ¶ 15.)

2. The Investigation

After the drug buys, Defendant Breiner conducted further investigation into Peto's identity

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[3] Defendant Breiner testified that "the" informant had been a reliable source of trustworthy information in the past, but it is not clear from the transcript to which informant he was referring. (Breiner Dep. 11:7-17.)

and location. (Barrett Dep. 16:3-17:1.) He researched the vehicle used in one of the buys and the person who was operating it. (Breiner Dep. 11:23-12:13.) His sources included Lebanon Village administration information, driving records, and police records. (*Id.*) He learned, through Lebanon Valley, that Peto was a nickname for a Samuel Ruiz[4] who lived at 197 Lebanon Village, Lebanon, Pennsylvania.[5] (Breiner Aff.[6] ¶¶ 4-6; Barrett Dep. 19:20-23.)

3. The Affidavits of Probable Cause

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[4] Plaintiff Fret testified that Plaintiff Ruiz's family nickname is "Peto." (Fret Dep. 12:6-22.) She calls him Peto, as do his mother and siblings. (*Id.*) Plaintiff Ruiz, however, testified that he has never heard the name Peto. (Ruiz Dep. 42:24-25, Sept. 7, 2006.) For purposes of this motion for summary judgment, the question of whether Plaintiff Ruiz actually goes by Peto is not material.

[5] Defendants' deposition testimony gave the address as 97 Lebanon Village but the criminal complaints and probable cause affidavits list the address as 197 Lebanon Village, as do the affidavits of both Defendants and the arrest warrant. (Breiner Dep. 12:11-12; Barrett Dep. 19:20-23; Defs.' Supp. Ex. F; Breiner Aff. ¶ 5; Barrett Aff. ¶ 5; Pls.' Ex. E.) The court will use 197 Lebanon Village as the correct address.

[6] Detectives Breiner and Barrett filed affidavits as Exhibit G and Exhibit J to their motion for summary judgment. These affidavits set forth their recollection of the events leading to the arrest and search on October 28,2002. They are not the same as the affidavits of probable cause at issue, dated in 2002, and attached to Defendants' motion for summary judgment as Supplemental Exhibit F. To distinguish them, Exhibits G and J will be cited as "[Name] Aff." and the affidavits of probable cause will be cited as "Defs.' Supp. Ex. F."

Based on information from the confidential informant and his own research, Defendant Breiner swore two criminal complaints and probable cause affidavits against Samuel Ruiz. (Defs.; Supp. Ex. F; Breiner Aff. ¶ 11; Breiner Dep. 10:25-12:12.) One, sworn on October 11, 2002, was for the drug buy that occurred on July 10, 2002. (Defs.' Supp. Ex. F.) The other, dated October 18, 2002, was for the drug buy that occurred on June 18. 2002. (*Id.*) Defendant Barrett relied on his observation of the seller in the first purchase and the information gathered by Defendant Breiner to swear a third criminal compliant and affidavit of probable cause on October 11, 2002, for the drug buy that took place on June 12, 2002. (*Id.*)

a. **Detective Breiner's Affidavits**

The affidavit for the drug buy on July 10, 2002, is addressed to a Samuel Ruiz residing at 197 Lebanon Village, Lebanon Pennsylvania. (Defs.' Supp. Ex. F.) Count one accuses him of knowingly delivering cocaine, or acting as an accomplice in the delivery, to Confidential Informant #15-2001 in exchange for $20. (*Id.*) Count two alleges criminal use of a communication facility in connection with the purported sale of drugs. Count three alleges that Samuel Ruiz knowingly delivered heroin, or acted as an accomplice in the delivery, to Confidential Informant #15-2001 in exchange for $20. (*Id.*) The affidavit provides the criminal statutes violated by the alleged acts. (*Id.*). It goes on to state the following:

Your affiants are Sergeant Brett Hopkins, Detective Todd Breiner, and Detective Sergeant Richard A. Radwanski, all members of the Lebanon County Detective Bureau/Lebanon County Drug Task Force, Lebanon County, PA. That your affiants have extensive training and experience in the investigation of drug law violations and have been trained in the administration of drug field testing.

On 10 Jul 02, at about 2044hrs. while in the 800 block of E. Crowell Street, Lebanon City, Lebanon County, Pa, the defendant, Samuel Ruiz, sold/delivered Cocaine, a schedule II controlled substance, and Heroin, a schedule I controlled substance, to Lebanon County Drug Task Force/Drug Enforcement Administration confidential informant $15-2002, in exchange for the sum of $40.00.

Your affiants conducted chemical field tests on the suspected Cocaine and Heroin. These tests were positive, respectively, for Cocaine, a schedule II controlled substance, and Heroin, a schedule I controlled substance.

That Samuel Ruiz arranged this Cocaine and Heroin delivery via the use of a residential and/or cellular phone.

Your affiants request a warrant of arrest to be issued for the named defendant.

(*Id.*) The affidavit is signed by Defendant Breiner and the other two officers identified. (*Id.*)

The October 18,2002, affidavit was for the drug buy that occurred on June 18, 2002. (*Id.*) It is addressed to a Samuel Ruiz, residing at 197 Lebanon Village, Lebanon Pennsylvania. (*Id.*) Count one accuses him of knowingly delivering cocaine, or acting as an accomplice in the delivery, to Confidential Informant #19-2001 in exchange for $20. (*Id.*) Count two alleges criminal use of a communication facility in connection with the purported sale of drugs. (*Id.*) The affidavit provides the criminal statutes violated by the alleged acts. (*Id.*) It goes on to state the following:

> Your affiants are Sergeant Brett Hopkins, Ptlm. Timothy Knight, and Detective Todd Breiner, all members of the Lebanon County Detective Bureau/Lebanon County Drug Task Force, Lebanon County, Pa. That your affiants have extensive training and experience in the investigation of drug law violations and have been trained in the administration of drug field testing.
>
> On 18 Jun 02, at about 2030hrs. while in the 800 block of Bowman Street, Lebanon City, Lebanon County, Pa, the defendant, Samuel Ruiz, sold/delivered Cocaine, a schedule II controlled substance, to Lebanon County Drug Task Force/Drug Enforcement Administration confidential informant #19-2001, in exchange for the sum of $20.00.

> Your affiants had a chemical field test conducted on the suspected Cocaine. This test was positive for Cocaine, a schedule II controlled substance.
>
> That Samuel Ruiz arranged this Cocaine delivery via the use of a residential and/or cellular telephone.
>
> Your affiants request a warrant of arrest be issued for the named defendant.

(*Id.*) The affidavit is signed by Defendant Breiner and the other two officer-affiants. (*Id.*)

b. <u>Detective Barrett's Affidavit</u>

The affidavit sworn by Detective Barrett on October 11, 2002, is addressed to Samuel Ruiz, residing at 197 Lebanon Village, Lebanon Pennsylvania. (*Id.*) Count one accuses him of knowingly delivering cocaine, or acting as an accomplice in the delivery, to Confidential Informant #19-2001 in exchange for $40. (*Id.*) Count two alleges criminal use of a communication facility in connection with the purported sale of drugs. The affidavit provides the criminal statutes violated by the alleged acts. (*Id.*) It goes on to state the following:

> Your affiants are Detective Sergeant Richard A. Radwanski, Sergeant Brett Hopkins, and Detective Martin Barrett, all members of the Lebanon County Detective Bureau/Lebanon

> County Drug Task Force, Lebanon County, Pa. That your affiants have extensive training and experience in the investigation of drug law violations and have been trained in the administration of drug field testing.
>
> On 12 Jun 02, at about 1615hrs, while in the 800 block of East Arnold Street, Lebanon City, Lebanon County, Pa, the defendant, Samuel Ruiz, sold/delivered Cocaine, a schedule II controlled substance, to Lebanon County Drug Task Force/Drug Enforcement Administration confidential informant #19-2001, in exchange for the sum of $40.00.
>
> On 12 Jun 02 your affiants conducted a chemical field test on the suspected Cocaine. This test was positive for Cocaine, a schedule II controlled substance.
>
> That Samuel Ruiz arranged this Cocaine delivery via the use of a residential and/or cellular telephone.
>
> Your affiants request a warrant of arrest be issued for the named defendant.

(*Id.*) The affidavit is signed by Defendant Barrett and the other two officer-affiants. (*Id.*)

The three criminal complaints and probable cause affidavits were presented to a magistrate judge. (*Id.*) On October 22, 2002, the magistrate issued a warrant for the arrest of Samuel Ruiz. (Pls.' Ex. E.) The warrant identified Samuel Ruiz's

address as 197 Lebanon Village, Lebanon, Pennsylvania. (*Id.*) On October 28, 2002, officers from the Lebanon County Drug Task Force attempted to execute the arrest warrant at 197 Lebanon Village, Lebanon, Pennsylvania. (Doc. 65 ¶ 12; Doc. 69-2 ¶ 22.) A resident of that address informed the officers that Samuel Ruiz had moved to 63 North 12th Street, Lebanon City, Pennsylvania. (Doc. 65 ¶ 13.) The officers went to the second address where they arrested Plaintiff Ruiz and searched the home he shared with Plaintiff Fret and searched Plaintiff Fret's body. (*Id.*; Doc. 69-2 ¶¶ 22-24.) Defendants were not present for the arrest and search. (Doc. 77 at 10.)

Defendant Breiner interviewed Plaintiff Ruiz at the police station after his arrest. When it became clear that Plaintiff Ruiz was arrested because of mistaken identity, he was released. (Breiner Dep. 31:4-8.)

B. Procedural History

The allegations giving rise to this action are stated in the second amended complaint filed by Plaintiffs on December 30, 2005. (Doc. 29.) They claim violation of their rights preserved by the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution.[7] (*Id.* at ¶ 64.) On February 1, 2007, Defendants moved for summary

[7] Plaintiffs refer to the Pennsylvania Constitution in their complaint (Doc. 29 ¶ 68) but do not state a claim for relief thereunder. Accordingly, the court will analyze their claims under federal constitutional law only.

judgment for two reasons: 1) they were not present at Plaintiffs' home at the time of the arrest and search and therefore have no liability based on those events; and 2) they are entitled to qualified immunity. (Doc. 64.) The court granted summary judgment on the first argument and denied summary judgment on the second for inadequate briefing. (Doc. 77.) Defendants moved for reconsideration of the denial of qualified immunity or, in the alternative, for leave to file supplemental briefing on the issue. (Doc. 79.) The court granted leave to file supplemental briefing (Doc. 86) which is now complete (Docs. 87-88). The matter is ripe for disposition.

II. Legal Standard

Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *accord Saldana v. Kmart Corp.*, 260 F.3d 228, 231-32 (3d Cir. 2001). A factual dispute is "material" if it might affect the outcome of the suit under the applicable law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A factual dispute is "genuine" only if there is a sufficient evidentiary basis that would allow a reasonable fact-finder to return a verdict for the non-moving party. *Id.* The court must resolve all doubts as to the existence of a genuine issues of material fact in favor of the non-moving party. *Saldana,* 260 F.3d at 232.

Once the moving party has shown that there is an absence of evidence to support the claims of the non-moving party, the non-moving party may not simply sit back and rest on the allegations in its complaint. Fed. R. Civ. P. 56(e); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). Instead, it must "go beyond the pleadings and by [its] own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." *Id.* (internal quotations omitted); *see also Saldana*, 260 F.3d at 232 (citations omitted). Summary judgment should be granted where a party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.: *Celotex*, 477 U.S. at 322. "'Such affirmative evidence – regardless of whether it is direct or circumstantial – must amount to more than a scintilla, but may amount to less (in the evaluation of the court) than a preponderance.'" *Saldana*, 260 F.3d at 232 (quoting *Williams v. Borough of West Chester*, 891 F.2d 458, 460-61 (3d Cir. 1989)).

III. Discussion

"The general rule of qualified immunity is intended to provide government officials with the ability reasonably to anticipate when their conduct may give rise to liability for damages. Where that rule is applicable, officials can know that they will not be held personally liable as long as their actions are reasonable in light of current American law." *Anderson v. Creighton*, 483 U.S. 635, 646 (1987)

(quotation and citation omitted). The Supreme Court set forth the order of inquiry on qualified immunity claims in *Saucier v. Katz*, 533 U.S. 194, 201 (2001)[8] *See also Wright v. City of Phila.*, 409 F.3d 595, 600-01 (3d Cir. 2005). The threshold question is this: "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Saucier*, 533 U.S. at 201; *accord Scott v. Harris*, __ U.S. __, 127 S. Ct. 1769 1774 (2007). If no

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[8] In its most recently concluded term, the Supreme Court indicated some willingness to reconsider the "rigid order of battle" prescribed by *Saucier* which places the constitutional question as the first item for analysis. *Scott v. Harris*, __ U.S. __, 127 S.Ct. 1769, 1774 n.4 (2007). Justice Breyer has repeatedly argued that a trial court should be permitted to determine the qualified immunity question before reaching the constitutional question, depending on the facts and law presented in each case. *See Morse v. Frederick*, __U.S. __, 127 S.Ct. 2618, 2641-42 (2007)(Breyer, J., dissenting); *Brosseau v. Haugen*, 543 U.S. 194, 201-02 (2004)(Breyer, J., concurring). Legal scholars and other judges are of the same mind as Justice Breyer. *See Morse*, 127 S. Ct. at 2642 (collecting criticism of *Saucier's* rule). The critics' strongest argument is that the *Saucier* analysis requires a court to reach and decide sometimes – difficult constitutional questions when an issue could be more easily resolved under the principles of qualified immunity. This practice may waste judicial resources and shield an erroneous constitutional holding from correction on appellate review. *Id.* at 2641. It certainly requires a court to "violate[] the longstanding principle that courts should 'not . . . pass on questions of constitutionality . . . unless such adjudication is unavoidable.'" *Id.* (quoting *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944)).

While *Saucier* may be falling out of favor for good reason, it remains the law of the land. Thus, this court will proceed with the analysis as prescribed.

constitutional violation is shown, the inquiry need not progress because the officers are entitled to judgment in their favor. *Saucier*, 533 U.S. at 201.

If the facts alleged demonstrate a constitutional violation, the court must ask whether the constitutional right was clearly established at the time, in light of the specific context of the case at bar. *Id.; Curley v. Klem*, __ F.3d __, No. 05-4701, 2007 WL 2404803, at *17 (3d Cir. Aug. 24, 2007). The "dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202; *see also Anderson*, 483 U.S. at 640 ("in the light of pre-existing law the unlawfulness must be apparent"). If the constitutional right was not clearly established at the time of the incident in question, summary judgment must be granted for the officer. *Saucier*, 533 U.S. at 202.

If, however, the constitutional right was clearly established, the court must determine whether the officer made a reasonable mistake about what the law required of him at the time. *Anderson*, 483 U.S. at 641; *Carswell v. Borough of Homestead*, 381 F.3d 235, 242 (3d Cir. 2004). "It is sometimes difficult for an officer to determine how the relevant legal doctrine . . . will apply to the factual situation the officer confronts." *Saucier*, 533 U.S. at 205. Thus, for example, an officer "can have reasonable, but mistaken, beliefs as to the facts establishing the existence of probable cause . . . and in [that] situation[ ] courts will not hold that they have violated the Constitution." *Id.* at 206.

The Third Circuit recently clarified the respective roles of the court and the jury on the question of qualified immunity. "[W]hether an officer made a reasonable mistake of law and is thus entitled to qualified immunity is a question of law that is properly answered by the court, not a jury." *Curley*, 2007 WL 2404803, at *25; *Carswell*, 381 F.3d at 242. If there are material facts in dispute regarding the event or events in question, a jury may make findings of fact to assist the court in determining whether the officer's mistake was reasonable and qualified immunity applies. *Curley* 2007 WL 2404803, at *23; *Carswell*, 381 F.3d at 242. Here, the qualified immunity analysis turns on the contents of the affidavits of probable cause in support of the arrest warrant issued for Samuel Ruiz. The contents of the affidavits are not in dispute. *C.f. Blaylock v. City of Phila.*, __ F.3d __, No. 06-2785, at *10 (3d Cir. Oct. 1, 2007).

A. Viewing the facts in the light most favorable to Plaintiffs, was a constitutional right violated?

The crux of the question before the court is found in ¶ 61 of the second amended complaint. (Doc. 29-1.) It states, "Mr. Ruiz['s] arrest on October 28, 2002, and subsequent imprisonment was *without probable cause*."[9] (Doc. 29-1 ¶ 61 (emphasis added).)

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[9] Plaintiffs' brief in opposition argues that Defendants violated Plaintiffs' constitutional rights by conducting a negligent investigation and recklessly providing incorrect information in their affidavits of probable cause. (Doc. 88 at 5-8.) Causes of action for negligent investigation and reckless provisions of

The Fourth Amendment guarantees the right to be free of arrest without probable cause.[10] U.S. Const. amend. IV; *Baker v. McCollan*, 443 U.S. 137, 142 (1979); *Berg v. County of Allegheny*, 219 F.3d 261, 269 (3d Cir. 2000). Therefore, the court must determine whether the affidavits of probable cause in this matter establish probable cause for arrest. If they do, the arrest of Plaintiff Ruiz was legal even if

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information are not stated in their second amended complaint, therefore the court will not entertain these arguments on summary judgment.

Moreover, if facts are misrepresented or omitted from an affidavit of probable cause, the individual arrested may challenge the affidavit's veracity in a hearing before the case proceeds. *Franks v. Delaware*, 438 U.S. 154, 171 (1978). "There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. *Allegations of negligence or innocent mistake are insufficient.*" *Id.* (emphasis added). Although *Franks* was decided in the criminal context, the Third Circuit applies this test to civil cases under § 1983. *Wilson v. Russo*, 212 F.3d 781, 786-87 (3d Cir. 2000). Plaintiffs' conclusory arguments would not trigger a *Franks* hearing.

[10] Because the constitutionality of arrests by state officials is governed by the specific terms of the Fourth Amendment, a due process analysis is not appropriate. *Berg v. County of Allegheny*, 219 F.3d 261, 269 (3d. Cir. 2000).

mistaken,[11] and Defendants are entitled to summary judgment because no constitutional violation occurred. If the affidavits of probable cause do not establish probable cause, the court will proceed to the qualified immunity analysis.

An affidavit of probable cause must state facts showing the "fair probability" that the proposed target of arrest engaged in criminal activity. *Wilson v. Russo*, 212 F.3d 781, 789 (3d Cir. 2000); *see Illinois v. Gates*, 462 U.S. 213, 235 (1983). The contents of the affidavit should enable the magistrate to make a practical, common-sense decision whether, considering the totality of the circumstances, probable cause exists to arrest the person accused. *Gates*, 462 U.S. at 232, 238 (probable cause "is a fluid concept – turning on the assessment of probabilities in particular factual contexts – not readily, or even usefully, reduced to a neat set of legal rules."); *see United States v. Ventresca*, 380 U.S. 102, 108 (1965); *Aguilar v.*

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[11] Cases of mistaken identity, unfortunately, will occur but "[n]ot ever mis-up in the issuance of an arrest warrant, even though it leads to the arrest of the wrong person with attendant inconvenience and humiliation, automatically constitutes a constitutional violation . . . ." *Thompson v. Prince William County*, 753 F.2d 363, 364 (4th Cir. 1985). "[W]hen the police have probable cause to arrest one party, and when they reasonably mistake a second party for the first party, then the arrest of the second party is a valid arrest." *Hill v. California*, 401 U.S. 797, 802 (1971). Thus, on a claim for false arrest, the court is not to inquire whether the person arrested actually committed the offense. *Dowling v. City of Phila.*, 855 F.2d 136, 141 (3d Cir. 1988). The proper inquiry is whether there was probable cause to arrest the true target. *Id.; Green v. City of Paterson*, 971 F. Supp. 891, 903 (D.N.J. 1997).

Texas, 378 U.S. 108, 113 (1964) *abrogated on other grounds by Gates*, 462 U.S. at 228. The facts may be derived from the personal observations of the affiant or from hearsay evidence, *Ventresca*, 380 U.S. at 108, but the affidavit must disclose which information is based on the affiant's own personal observations and which information is hearsay, *United States v. Whiteley*, 401 U.S. 560, 565 (1971); *Butts v. City of Bowling Green*, 374 F. Supp. 2d 532, 543 (W.D. Ky. 2005). The requirement that an affidavit state *facts* rather than *conclusions* preserves the Fourth Amendment's requirement that "the inferences from the facts which lead to the complaint '(must) be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in then often competitive enterprise of ferreting out crime.'" *Aguilar*, 378 U.S. at 112-13 (quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948)); *accord Gates*, 462 U.S. at 239. A magistrate "should not accept without question the complainant's mere conclusion." *Aguilar*, 378 U.S. at 113; *accord Gates*, 462 U.S. at 239.

When, as in the instant matter, police rely on a confidential informant to provide some of the information in an affidavit, the magistrate must be informed of 1) some of the underlying circumstances supporting the informant's story and 2) some of the underlying circumstances leading to the affiant's conclusion that the informant may be believed. *Gates*, 462 U.S. at 231. Specific facts that establish the informant's "veracity, reliability and basis of knowledge" are highly relevant to determining whether the totality of the circumstances show

probable cause for arrest.[12] *Id.* at 230, 233. An informant may be shown to be credible and reliable when the affidavit contains facts of previous cooperation by the same informant that led to investigations, arrests, or convictions. *United States v. Reeves*, 210 F.3d 1041, 1045 (9th Cir. 2000); *see Gates*, 462 U.S. at 233. The basis of an informant's knowledge is demonstrated by describing the informant's first-hand account of illegal activity, supported by sufficient detail. *Gates*, 462 U.S. at 234. The officer should also set forth the facts of his or her own investigation that corroborate the illegal activity alleged by an informant. *United States v. Ritter*, 416 F.3d 256, 263 (3d Cir. 2005); *see Gates*, 462 U.S. at 226. Corroboration of innocuous details about the proposed target of arrest is not sufficient. *United States v. Danhauer*, 229 F.3d 1002, 1006 (10th Cir. 2000); *United States v. Wilhelm*, 80 F.3d 116, 120 (4th Cir. 1996). Ultimately, "if a tip has a relatively low degree of reliability, more

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[12] Before *Illinois v. Gates*, courts used a two-prong test to determine whether a confidential informant's information could provide at least a partial basis to find probable cause, a "basis of knowledge" prong and a "veracity" prong. *See Gates*, 462 U.S. at 229 n.4. Information about the informant had to satisfy both prongs to contribute to establishing probable cause. *Id.* If it failed one prong of the test, the information was discounted. *Id.* at 230 n.5. The *Gates* court eliminated the independent nature of the prongs in favor of the totality-of-the-circumstances approach, but affirmed that an informant's veracity, reliability, and basis of knowledge remain highly relevant in determining the value of his information. *Id.* at 230. Thus, aspects of pre-*Gates* case law discussing these qualities of an informant's information remain good law and are cited throughout.

[corroborating] information will be required to establish the requisite quantum of suspicion than would be required if the tip were more reliable." *Alabama v. White*, 496 U.S. 325, 300 (1990).

The following examples demonstrate the difference between affidavits that properly establish probable cause by being factually specific and following the standards governing information from a confidential informant versus those that do not. In *McCray v. Illinois*, 386 U.S. 300, 304 (1967), an affidavit established probable cause when officers described "with specificity what the informer actually said, and why the officer thought the information was credible." They relayed the underlying circumstances leading to the informant's knowledge of the location of a cache of narcotics. *Id.* They also personally observed the target of the arrest and described their observations to the issuing magistrate. *Id.* These details in the affidavit led to a sound finding of probable cause to arrest. *Id.; see also Pansy v. Preate*, 870 F. Supp. 612, 625-26 (M.D. Pa. 1994)(a twenty-two page affidavit, supported by "extensive documentation from surveillance and testimony from eyewitnesses show[ed] the presence of probable cause").

The Eastern District of Pennsylvania recently held that a judicial officer had a substantial basis for concluding that probable cause existed to issue a search warrant when the supporting affidavit set forth information from a confidential police informant "who previously had provided police with information leading to arrests and contraband[,] who was actively assisting police in other investigations," and who had never provided faulty information.

United States v. Porter, 438 F. Supp. 2d 554, 556 558 (E.D. Pa. 2006). The informant gave detailed information about the defendant including his possession of a firearm (in violation of his parole), the name of the person with whom he was staying, and an in-person identification of the building in which the defendant lived. *Id.* at 556, 558. The informant was "intimately familiar" with the neighborhood in which the residence to be searched was located. *Id.* at 556. The affidavit further stated that the officer corroborated the defendant's whereabouts with the defendant's father. *Id.*

The factually specific and constitutionally sound affidavit of probable cause in *McCray* and *Porter* stand in stark contrast to affidavits found to violate the Fourth Amendment requirements. In *Aguilar v. Texas*, officers presented an affidavit in support of an application for a search warrant that read, in pertinent part, "[a]ffiants have received reliable information from a credible person" and accordingly believed that drugs and drug paraphernalia were being kept at the target residence. 378 U.S. at 109. The Supreme Court held that this statement did not provide probable cause to issue the subsequent search warrant because it stated conclusions, not facts. *Id.* at 114. The Court observed that the magistrate should have been "informed of some of the underlying circumstances . . . from which the officer concluded that the informant, whose identity need not be disclosed, was 'credible' or his information 'reliable.'" *Id.* (citation omitted). Without such information, "the inferences from the facts which lead to the complaint [were] drawn not by a neutral and detached magistrate, as

the Constitution requires, but instead, by a police officer engaged in the often competitive enterprise of ferreting out crime or, as in this case, by an unidentified informant." *Id.* at 115. (quotations and citations omitted); *see also Giordenello v. United States*, 357 U.S. 480 (1958); *Nathanson v. United States*, 290 U.S. 41 (1933); *Danhauer*, 229 F.3d at 1006; *United States v. Reddrick*, 90 F.3d 1276, 1280 (7th Cir. 1996).

The Third Circuit, in *DeAngelo v. Yeager*, 490 F.2d 1012 (3d Cir. 1973), held constitutionally invalid the following affidavit made in support of a request for a search warrant:

> [T]hrough information received from a reliable informant who has given information on previous occasions which resulted in arrests and convictions and who has and must remain anonymous states that telephone number 684-4970 is being used for Lottery Bets and Bookmaking Bets all day from Monday to Saturday by a white male, Emilio DeAngelo of 464 No. 11 St. to which the telephone number is connected to . . . The undersigned made observations and investigations on Monday, February 24, 1969 from 10:00 A.M. to 12:00 noon and again on Tuesday, February 25, 1969, from 11:00 A.M. to 1:00 P.M. and again from 2:00 P.M. to 3:30 P.M. and during these observations the undersigned did observe several white males and females walk to the said location, stay for a short period of time and then leave. Also this telephone number has been called several times and most of the

> time the telephone was busy, and when it was not busy a man would answer after a short ring and just say hello. The telephone number was again redialed and again the telephone was busy for a few minutes and after a short period upon redialing a man would again answer after a short ring, just saying hello.

Id. at 1013-14. This affidavit gave "no information as to the factual basis of the informant's conclusion that a stated telephone number at a stated address is being used for [illegal activity]. . . . [T]he magistrate had no basis for exercising his required independent judgment whether the informant's conclusion was more than surmise or repetition of rumor." *Id.* at 1014. The court further observed that the personal observations by the affiant corroborated innocuous details about the target, rather than the informant's allegations of illegal activity. *Id.* Last, the court found the affiant's statement that information from the informant had led to convictions in the past provided the magistrate with "some basis for concluding that the informant was not an irresponsible person," but did not provide "data sufficient to enable [the magistrate] to judge whether any essential conclusory statement of the informant is more than speculation or surmise. . . ." *Id.* at 1014-15; *see United States v. Peck*, 317 F.3d 754, 756 (7th Cir. 2003); *Wilhelm*, 80 F.3d at 118, 120. For all of these reasons, the affidavit failed to establish probable cause. *DeAngelo*, 490 F.2d at 1015.

Having examined the standards applicable to probable cause, the court turns to the standard applicable to its review of the magistrate's conclusion that the affidavits at issue here established probable cause. This court must determine whether the information contained within the four corners of the affidavit provided a substantial basis for the magistrate to have concluded that probable cause existed. *Gates*, 462 U.S. at 236; *Ritter*, 416 F.3d at 264; *United States v. Conley*, 4 F.3d 1200, 1206 (3d Cir. 1993); *see United States v. Whitner*, 219 F.3d 289, 296 (3d Cir. 2000). Evidence presented to the reviewing court that was not before the issuing magistrate must be ignored. *Aguilar*, 378 U.S. at 109 n.1. This review is highly deferential to the magistrate's original determination and the "temptation to second-guess [that] conclusion should be avoided." *Ritter*, 416 F.3d at 264; *see Gates*, 462 U.S. at 236; *Spinelli v. United States*, 393 U.S. 410, 419 (1969) *abrogated on other grounds by Gates*, 462 U.S. at 228. In a doubtful or marginal case, the matter "should be largely determined by the preference to be accorded to warrants." *Ventresca*, 380 U.S. at 109; *Ritter*, 416 F.3d at 264. Even so, the reviewing court must evaluate the affidavit mindful of the legal standards governing probable cause to ensure that the protections inherent in the Fourth Amendment area enforced. *See Gates*, 462 U.S. at 239; *Ventresca*, 380 U.S. at 111-12. The deference afforded the magistrate's finding of probable cause is "no refuge for [evidence] legal error." *Ritter*, 416 F.3d at 275 (Smith, Jr., dissenting in part and concurring in the judgment).

With this background, the court turns to the content within the four corners of the affidavit in this matter and concludes that the magistrate did not have a substantial basis for finding probable cause to arrest. The first two pages of each affidavit set forth conclusory statements that Samuel Ruiz committed the crimes cited therein. Each affidavit verifies that its contents "are true and correct to the best of [each affiant's] knowledge or information and belief," but none of the affidavits establish the *factual basis* for the affiant's knowledge or information and belief. The court will discuss only one of the affidavits as they are all virtually identical for purposes of this analysis.

> Your affiants are Sergeant Brett Hopkins, Detective Todd Breiner, and Detective Sergeant Richard A. Radwanski, all members of the Lebanon County Detective Bureau/Lebanon County Drug Task Force, Lebanon County, Pa. That your affiants have extensive training and experience in the investigation of drug law violations and have been trained in the administration of drug field testing.
>
> On 10 Jul 02, at about 2044hrs. while in the 800 block of E. Crowell Street, Lebanon City, Lebanon County, Pa, the defendant, Samuel Ruiz, sold/delivered Cocaine, a schedule II controlled substance, and Heroin, a schedule I controlled substance, to Lebanon County Drug Task Force/Drug Enforcement Administration

> confidential informant #15-2001, in exchange for the sum of $40.00.
>
> Your affiants conducted chemical field tests on the suspected Cocaine and Heroin. These tests were positive, respectively, for Cocaine a schedule II controlled substance, and Heroin, a schedule I controlled substance.
>
> That Samuel Ruiz arranged this Cocaine and Heroin delivery via the use of a residential and/or cellular phone.

The first and third paragraphs are unobjectionable. The affiants have personal knowledge of the facts stated therein. The second and fourth paragraphs-sentences, really – are the sources of this affidavit's constitutional infirmity. They state the affiants' conclusion that Samuel Ruiz sold drugs on the date and time identified, arranging the transaction by telephone. There are no facts or circumstances that would allow the *magistrate* to draw the inference, as required by the Fourth Amendment – such as how the affiants came to know that the seller's name was Samuel Ruiz. *See, Gates*, 462 U.S. at 232, 238; *Ventresca*, 380 U.S. at 108; *Aguilar*, 378 U.S. at 113. Were the affiants able to make a personal identification of the dealer because they observed the drug transaction and they personally recognized the seller as someone who has sold drugs in the past? Did the affiants get an identification from someone else, which they investigated and corroborated with additional facts? On the face of this affidavit, the issuing magistrate

had no way to connect the drug transaction to someone named Samuel Ruiz. On this basis alone, the affidavit fails to establish probable cause.

Moreover, the affidavit states that a confidential informant purchased the drugs from Samuel Ruiz. It appears from the face of the affidavits that the informant's only involvement in this case was just that – the purchase. The affidavit fails to relate that the police relied on one or both informant's informal identification of the seller by the nickname "Peto" to begin their investigation of the seller's identity. Thus, the allegation in the affidavit that Samuel Ruiz sold cocaine was not derived solely from the personal observations and investigation of the affiants. It came, in part, from information supplied by a confidential informant. Failing to relate that operative fact was error. *See Whiteley*, 401 U.S. at 565; *Butts*, 374 F. Supp. 2d 543. Not having disclosed that some information leading to the identification of the drug dealer had been received from a confidential informant, the affiants also failed to set forth any factual support for the informant's credibility, reliability, veracity, or basis of knowledge. They did not provide facts that would corroborate or confirm the informal identification of the seller as "Samuel Ruiz."

Police officers are not required to "relate the entire history of events leading up to a warrant application with every potentially evocative detail that would interest a novelist or gossip" to establish probable cause. *Wilson*, 212 F.3d 787. An affidavit of probable cause may not be "judged as an entry in an essay contest." *United States v. Harris*, 403 U.S. 573, 582 (1971). The Fourth Amendment, however,

demands more than conclusory haiku. For all of the reasons stated above, these affidavits are reminiscent of the constitutionally infirm affidavits in *Aguilar* and *DeAngelo*. They contain none of the factual information that validated the affidavits in *McCray* and *Porter*. They failed, as a matter of Fourth Amendment jurisprudence, to provide a substantial basis for the magistrate to find probable cause to arrest.

B. Was the constitutional right clearly established at the time of the incident in light of the specific context of this case?

This inquiry as to whether a right was clearly established is governed by the specific context of the case, not by broad propositions of law. *Saucier*, 533 U.S. at 202; *Curley*, 2007 WL 2404803, at *17; *Bartholomew v. Pennsylvania*, 221 F.3d 425, 429 (2000). The right to be free of arrest without probable cause was clearly established at the time Defendants submitted their affidavits of probable cause. *See* U.S. Const. amend IV; *Berg*, 219 F.3d at 269; *Orsatti v. N. J. State Police*, 71 F.3d 480, 482 (3d Cir. 1995). The following standards governing the probable cause determination were also clearly established at that time: that a magistrate must find probable cause from the facts and circumstances presented within the affidavit and not from conclusory statements without apparent factual basis, *Gates*, 462 U.S. at 239; *Aguilar*, 378 U. S. at 113-14; *Johnson*, 333 U.S. at 14; that affiants must distinguish between their own personal observations

and information provided by others, *Whiteley*, 401 U.S. at 565; *see Ventresca*, 380 U.S. at 108; and that affiants must set forth the facts and circumstances indicating the truthfulness, credibility, and reliability of information provided by a confidential informant or provide corroborating information from their own activities, *Gates*, 462 U.S. at 239.

C. Did Defendants make an objectively reasonable mistake about what the law required of them at the time they signed the probable cause affidavits?

The objective reasonableness inquiry will benefit from a statement of the issues *not* before the court. At the time Defendants swore these affidavits, they were not faced with making a split-second decision in the "dangerous and complex world" of law enforcement. *Carswell*, 381 F.3d at 244 (quoting *Smith v. Freland*, 954 F.2d 343, 347 (6th Cir. 1992)); *see Sharrar v. Felsing*, 128 F.3d 810, 821 (3d Cir. 1997)(objective reasonableness "must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain and rapidly evolving – about the amount of force that is necessary in a particular situation")(quotation omitted) *abrogated on other grounds by Curley*, 2007 WL 2404803, at *25. Rather, four months after the events giving rise to the affidavits, at least one officer took a moment to sit down and write these affidavits of probable cause with time to reflect on both the facts pertinent to the affidavits and the law

governing his submission. The only facts pertinent to the question of the objective reasonableness in seeking the warrants are contained within the four corners of their affidavits.[13]

If a "reasonably well-trained officer in [Defendants'] position would have known that his affidavit failed to establish probable cause," he will lose the shield of qualified immunity. *Malley v. Briggs*, 475 U.S. 335, 345 (1986); *accord Wilson*, 212 F.3d 789-90; *see Groh v. Ramirez*, 540 U.S. 551, 565 (2004). "[A]n officer who knows that objectively unreasonable decisions will be actionable may be motivated to reflect, before submitting a request for a warrant, upon whether he has a reasonable basis for believing that his affidavit establishes probable cause." *Malley*, 475 U.S. at 343. "[I]f no officer of reasonable competence would have requested the warrant, *i.e.*, [the] request is outside the range of the professional competence expected of an officer," the officer's action "is not just a reasonable mistake, but

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[13] Defendants set forth numerous facts within their personal knowledge at the time the affidavits were sworn-but not included in the text of the affidavits – that, they argue, established probable cause. These facts are inapposite to the present analysis. If the arrest had been made without warrant, a different standard of probable cause would apply-whether "at the moment the arrest was made . . . the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent [person] in believing that [the target] had violated [the law]." *Hunter v. Bryant*, 502 U.S. 224, 228 (1991)(quotation omitted). Because Defendants sought a warrant in this matter, facts not contained within the affidavits of probable cause are not properly considered in the objective reasonableness determination here.

an unacceptable error indicating gross incompetence or neglect of duty." *Id.* At 346 n.9. Such reflection by an officer-affiant is "desirable, because it reduced the likelihood that the officer's request for a warrant will be premature. Premature requests for warrants are at best a waste of judicial resources; at worst, they lead to premature arrests, which may injure the innocent. . . ." *Id.* At 343-44.

The Supreme Court did not reach the question of the constitutional validity of the arrest warrant in *Malley*, nor did it examine the officer-affiant's objective reasonableness in seeking the warrant. Two cases that follow *Malley*, with facts similar to those at hand, are instructive. In the Eastern District of Kentucky, a criminal complaint used to secure an arrest warrant stated that the target of arrest:

> [u]nlawfully and intentionally rendered assistance to Corey Butts (who is being sought on a warrant for Rape 1st degree) by providing him with transportation to an unknown location. The defendant knew that [police] were attempting to locate and arrest Corey Butts for Rape 1st degree. All in violation of KRS 520.130 hindering apprehension second degree.

Butts, 374 F. Supp. 2d at 535. The warrant was issued and the target was arrested. *Id.* at 538. In the subsequent civil suit for arrest without probable cause, the officer claimed a witness gave him the information stated in the affidavit. *Id.* at 541. Nothing in the affidavit indicated that the

information was based on anything but his own personal knowledge. *Id.* Because the officer had not "given the witness's name, a statement about how he knew the witness, any facts about whether the witness was reliable, or an affidavit from the witness," the district court held that the magistrate did not have a substantial basis to find probable cause. *Id.* at 542. Further, "[i]t is unreasonable for [the officer-affiant] not to present all of the facts to the judge so that the judge can make a neutral and independent determination of probable cause." *Id.* at 544. "[A]ny reasonably trained officer should have known" that a "bare-bones, conclusory affidavit does not establish probable cause." *Id.* "[A]ny reasonable officer would have known that additional information about [t]he reliability of the witness was required to establish probable cause." *Id.* Qualified immunity was denied because an objectively reasonable officer would have known that the affidavit failed to establish probable cause. *Id.*

In *Montes v. Gallegos*, 812 F. Supp. 1159 (D.N.M. 1992), the court examined an affidavit of probable cause stated that:

> Battery: When Defendant did commit the crime of Battery, Battering Paul George Lacome, Mark Lacome and Anselmo Duran.
> Disorderly Conduct: When Defendant did act in a boisterous loud manner at Monte Carlo Lounge.
> Public Affray: When Defendant did engage in Public fighting causing injury to another person.

> Criminal Damage to property: When Defendant did commit the crime to damages to peroperty [sic] by breaking a window in the Monte Carlo Lounge.

Id. at 1160. The court concluded that this affidavit contained only conclusory statements that the target of arrest committed the crimes alleged, and as such was "facially invalid." *Id.* at 1163. The were no facts that would have enabled the Magistrate to determine the veracity of the allegations, in particular, "how did the affiant come to these conclusions about Montes – did he have personal knowledge, or did someone tell him and if so, is the information reliable." *Id.* at 1163-64. As the facts later evolved, the affiant had relied on witness statements to swear the affidavit, not on his own personal observations or investigation. *Id.* at 1164. This information was absent from the affidavit itself. *Id.* Without a "single piece of supporting information in the affidavit that would reasonably lead an officer to the mistaken conclusion that such an affidavit provided the magistrate with probable cause upon which to issue a warrant," the warrant was facially invalid. *Id.* at 1164. The arresting officer (who had not prepared the affidavit) was not objectively reasonable in relying on so conclusory an affidavit, thus he was not entitled to qualified immunity.

The affidavits before this court are as conclusory as the affidavits in *Butts* and *Montes*. As demonstrated *supra*, there are no facts in the instant affidavits that allowed the issuing magistrate to make an independent link between the transaction

for illegal drugs and someone named Samuel Ruiz. The officers in *Butts* and *Montes* also relied – without so stating in their affidavits – on information from a witness without providing the requisite facts and circumstances to the issuing magistrate to allow the magistrate to infer that the witness was truthful, reliable, credible, or demonstrated a legitimate basis of knowledge. This court draws the same conclusion achieved in *Butts* and *Montes*: it is well below the standards of professionalism expected of police officers to issue such conclusory affidavits as the three at bar. An objectively reasonable police officer would set forth at least minimal facts allowing the magistrate to conclude the probable cause to arrest exists. Any reasonably well-trained officer-affiant would identify the source of his or her information about the target of arrest. If a witness or a confidential informant supplied information, the objectively reasonable affiant would set forth the factual basis of that person's reliability, credibility, or basis of knowledge and would include corroborating information garnered from the affiant's own investigation or observation. These three affidavits, which fail to meet the standards of the type of affidavit that an objectively reasonable officer would submit, are not the result of a reasonable mistake as to the dictates of the Fourth Amendment jurisprudence. The decision to set forth conclusory, bare-bones affidavits with no factual support for any of the conclusions stated within is an unacceptable error. *See Malley*, 475 U.S. at 343-44.

IV. Conclusion

This is not a marginal case in which the court must decide the matter on the basis of the preference of warrants. *C.f. Ventresca*, 380 U.S. at 109. These affidavits violate the mandate of the Fourth Amendment in so profound a way that no reasonable police officer would have requested a warrant using these affidavits. Accordingly, the defense of qualified immunity is denied.

/s/ Sylvia H. Rambo
SYLVIA H. RAMBO
United States District Judge

Dated: October 3, 2007.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
PENNSYLVANIA

SAMUEL RUIZ and CARMEN LYDIA FRET APONTE, Plaintiffs	:	CIVIL NO: 1:04-CV-02359
	:	JUDGE
	:	SYLVIA H. RAMBO
vi.	:	
LEBANON COUNTY, PENNSYLVANIA, et al., Defendants	:	

ORDER

In accordance with the foregoing memorandum of law, **IT IS HEREBY ORDERED THAT** the motion for summary judgment by Defendants Todd Breiner and Martin Barrett on the basis of qualified immunity (Doc. 64) is **DENIED.**

/s/ Sylvia H. Rambo
SYLVIA H. RAMBO
United States District Judge

Dated: October 3, 2007.

CRIMINAL COMPLAINTS AND PROBABLE CAUSE AFFIDAVITS

1. Your affiants are Sergeant Brett Hopkins, Detective Todd Breiner, and Detective Sergeant Richard A. Radwanski, all members o the Lebanon County Detective Bureau/Lebanon County Drug Task Force, Lebanon County, Pa. That your affiants have extensive training and experience in the investigation of drug law violations and have been trained in the administration of drug field testing.

On 10 Jul 02, at about 2044hrs, while in the 800 block of E. Crowell Street, Lebanon City, Lebanon County, Pa, the defendant, Samuel Ruiz, sold/delivered Cocaine, a schedule II controlled substance, and Heroin, a schedule I controlled substance, to Lebanon County Drug Task Force/Drug Enforcement Administration confidential informant #15-2001, in exchange for the sum of $40.00.

Your affiants conducted chemical field tests on the suspected Cocaine and Heroin. These tests were positive, respectively, for Cocaine, a schedule II controlled substance, and Heroin, a schedule I controlled substance.

That Samuel Ruiz arranged this Cocaine and Heroin delivery via the use of a residential and/or cellular telephone.

Your affiants request a warrant of arrest be issued for the named defendant.

2. Your affiants are Sergeant Brett Hopkins, Ptlm. Timothy Knight, and Detective Todd Breiner, all members of the Lebanon County Detective Bureau/Lebanon County Drug Task Force, Lebanon County, Pa. That your affiants have extensive training and experience in the investigation of drug law violations and have been trained in the administration of drug field testing.

On 18 Jun 02, at about 2030hrs, while in the 800 block of Bowman Street, Lebanon City, Lebanon County, Pa, the defendant, Samuel Ruiz, sold/delivered Cocaine, a schedule II controlled substance, to Lebanon County Drug Task Force/Drug Enforcement Administration confidential informant #19-2001, in exchange for the sum of $20.00.

Your affiants had a chemical field test conducted on the suspected Cocaine. This test was positive for Cocaine, a schedule II controlled substance.

That Samuel Ruiz arranged this Cocaine delivery via the use of a residential and/or cellular telephone.

Your affiants request a warrant of arrest be issued for the named defendant.

3. Your affiants are Detective Sergeant Richard A. Radwanski, Sergeant Brett Hopkins, and Detective Martin Barrett, all members of the

Lebanon County Detective Bureau/Lebanon County Drug Task Force, Lebanon County, Pa. That your affiants have extensive training and experience in the investigation of the drug law violations and have been trained in the administration of drug field testing.

On 12 Jun 02, at about 1615hrs. while in the 800 block of East Arnold Street, Lebanon City, Lebanon County, Pa, the defendant, Samuel Ruiz, sold/delivered Cocaine, a schedule II controlled substance, to the Lebanon County Drug Task Force/Drug Enforcement Administration confidential informant #19-2001, in exchange for the sum of $40.00.

On 12 June 02 your affiants conducted a chemical field test on the suspected Cocaine. This test was positive for Cocaine, a schedule II controlled substance.

That Samuel Ruiz arranged this Cocaine delivery via the use of a residential and/or cellular telephone.

Your affiants request a warrant of arrest be issued for the named defendant.